

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

HELEN MORGAN

Claimant

VS.

KERRY, INC.

Respondent

AND

LIBERTY MUTUAL FIRE INS. CO.

Insurance Carrier

Docket No. 1,027,502

ORDER

STATEMENT OF THE CASE

Claimant requested review of the May 4, 2009, preliminary hearing Order entered by Administrative Law Judge Steven J. Howard. John R. Stanley, of Overland Park, Kansas, appeared for claimant. Stephanie Warmund, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that the evidence did not prove that it was more probably true than not that claimant's current complaints are related to her work-related injury of February 20, 2004.

The record on appeal consists of the transcript of the April 28, 2009, Preliminary Hearing and the exhibits and the transcript of the May 22, 2007, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant requests that the Board reverse the ALJ's Order, arguing that the ALJ disregarded the undisputed medical evidence proffered by claimant as well as claimant's testimony.

Respondent requests that the Board dismiss this appeal, arguing the Board does not have jurisdiction over the issue of whether a claimant is entitled to medical treatment.

The issues for the Board's review are:

- (1) Does the Board have jurisdiction over the issue in this appeal?
- (2) If so, are claimant's current complaints related to her work-related injury of February 20, 2004?

FINDINGS OF FACT

Claimant was injured at work on February 20, 2004, when she tried to pull a floor jack and slipped and fell. She landed on her right hip with her arms out at an angle and her left leg over to the side. She immediately felt a burning pain in her left leg and knee. She was first sent to Olathe Occupational Medicine and was then referred to Dr. Prem Parmer, who diagnosed her with an anterior cruciate ligament (ACL) tear. He performed ACL reconstruction and left knee arthroscopy on April 20, 2004. She continued to have problems with her left knee and in February 2005 underwent a second left knee arthroscopic surgery.

Claimant was seen by Dr. Steven Hendler on June 7, 2005, at the request of respondent. She complained of pain in both hands and a burning sensation that extended to both shoulders. She also complained of a shooting pain in her shoulder with elevation. She also told him she had neck and back pain for a couple of years from a previous injury. Dr. Hendler performed nerve conduction testing on claimant's upper extremities on June 27, 2005. The testing showed no evidence of radiculopathy, plexopathy or neuropathy. He commented that on June 27, claimant said her left shoulder was bothering her and she had a slightly decreased range of motion and tenderness to palpation. The right side was unremarkable. He released claimant from treatment for her upper extremities issues with no restrictions.

Claimant was seen on May 2, 2006, by Dr. P. Brent Koprivica at the request of her attorney. She told him that she complained to her physicians of problems with both upper extremities, but that her complaints were not documented. She also associated the problems with her upper extremities to the use of crutches after her first surgery. She also said that after her return to work, she was restricted to light duty and was given desk work, and that the repetitive use of her hands in this light duty work also contributed to her bilateral upper extremity complaints. Claimant told Dr. Koprivica that because of over-compensation after her left knee surgery, she developed pain in her right knee. She also told him she had right hip pain since her fall in February 2004.

Dr. Koprivica opined that it was plausible that claimant would sustain injuries to her bilateral shoulders in the fall as well as because of her use of crutches following her surgery. He also believed that claimant sustained an injury to her right hip in her fall. Although he did not find significant pathology in his examination, he recommended she have an MRI of her right hip to check for a potential injury.

On May 7, 2007, a preliminary hearing was held, at which time claimant was requesting medical treatment for her right hip, right knee and left shoulder. She testified she developed pain in her shoulders due to her use of crutches after her surgery. She also described a burning pain in her right hip from the accident and pain in the inside of her right knee. In an Order dated May 22, 2007, the ALJ ordered the parties to agree on a specialist to examine and treat claimant's left shoulder only. Claimant was eventually referred to Dr. Lowry Jones, Jr., and had arthroscopic surgery on her left shoulder on April 4, 2008.

Claimant is again requesting treatment for her right shoulder and right knee, as well as for her low back. She filed a separate workers compensation claim in 2007 in regard to her upper extremities for bilateral carpal tunnel syndrome.

Claimant testified that she has burning from the front to the back of her right shoulder. She says that although she complained to the doctors at Olathe Occupational Medicine and Dr. Parmer about her right shoulder after her accident, they were mostly concerned with her left knee.

Claimant said that her left knee continues to feel weak and unstable and when she walks, she puts most of her weight on her right side. Also, when she stands, she puts most of her weight on her right side. This has made her right knee hurt. She also has a burning pain in her low back with tingling that radiates down to her buttocks and right hip. She said she started having that pain shortly after her fall, and it has progressively gotten worse.

Claimant was seen by Dr. Lowry Jones, Jr., on February 14, 2008, to treat her left shoulder. During his examination, he found that claimant's right shoulder range of motion was normal. She had excellent strength against resistance on her right side but had pain with overhead activity consistent with impingement and posterior subluxation on the left.

Claimant was seen on November 23, 2008, by Dr. James Stuckmeyer, at the request of her attorney. She told him she fell on February 20, 2004, and injured her bilateral shoulders and bilateral knees. His chronology of claimant's medical records sets out that she complained to Dr. Parmer of right knee pain in September 2005, which she attributed to overuse. Dr. Parmer's records of November 8, 2007, indicated that she was evaluated for right shoulder pain, bilateral hip pain, and right knee pain. An MRI of claimant's right shoulder was done on November 10, 2007, which showed a deep, partial articular-sided rotator cuff tear involving the distal supraspinatus tendon, but no clear-cut extension all the way through the tendon. An MRI of claimant's right knee performed the same day revealed no evidence of meniscal pathology or ligamentous tear but, according to Dr. Parmer, showed degenerative changes.

When claimant saw Dr. Stuckmeyer in November 2008, she complained of diffuse pain in her cervicothoracic and low back regions with radiation into her right lower extremity. She continued to complain of pain in her right shoulder and her right knee.

Upon examination, claimant had tenderness of her right knee. She had full range of motion. She had a limp that favored her left lower extremity. Examination of her right shoulder revealed tenderness in the subacromial space, glenohumeral joint, and supraspinatus and infraspinatus musculatures. She had a reduced range of motion. Examination of her back revealed tenderness at C5 to C7. She had mid-thoracic tenderness without spasm. She had full range of motion of the cervical spine. She had tenderness at L5-S1. Straight leg raising test was negative in both lower extremities and her muscle strength was normal.

Dr. Stuckmeyer opined that claimant injured both her right and left shoulder in her accident of February 20, 2004. He also agreed with Dr. Koprivica that her use of crutches following her knee surgery contributed to development of her bilateral shoulder condition. He believed that her right knee condition was the result of her antalgic gait and overcompensation. Dr. Stuckmeyer also said that claimant's right hip pain was centralized in the lumbosacral region, and the hip component may represent a radicular component. After a review of the medical records, he said these symptoms had been chronic in nature following the date of accident.

In summary, Dr. Stuckmeyer believed that claimant's right knee, right shoulder, and low back conditions were related to her work-related accident in February 2004. He did not believe that her cervical or thoracic complaints were work related.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.¹ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.²

¹ K.S.A. 2008 Supp. 44-501(a).

² *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.³

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*,⁴ the court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

K.S.A. 44-534a(a)(2) states in part:

A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁶

³ *Id.* at 278.

⁴ *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

⁵ K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

⁶ K.S.A. 2008 Supp. 44-555c(k).

ANALYSIS

Respondent contends the Board is without jurisdiction to review the ALJ's preliminary hearing Order because the only issue was medical treatment. Respondent admits claimant was injured on February 20, 2004, but argues claimant has received all necessary medical treatment for her injuries. Although in its brief to the Board respondent contends that there is no issue of compensability, that was clearly not respondent's position at the May 22, 2007, preliminary hearing.

THE COURT: We've had an off-the-record discussion. Apparently claimant's requesting medical treatment for the right hip, right knee, and left shoulder, all of which are contested by the respondent. Respondent has admitted a left knee and there's no request for treatment on the left knee, correct?

MR. STANLEY [Claimant's attorney]: Correct.⁷

At the April 28, 2009, preliminary hearing, claimant again requested medical treatment for her right hip (low back), right knee, and for her right shoulder. She also requested temporary total disability compensation. The ALJ denied claimant's request for preliminary benefits because he determined that claimant failed to prove causation, that is that these conditions were work related. The ALJ did not make a determination that claimant was not in need of medical treatment and that she was not temporarily and totally disabled. K.S.A. 44-534a(a)(2) gives the Board jurisdiction to review a disputed issue of "whether the injury arose out of and in the course of the employee's employment." This was the basis for the ALJ's denial of preliminary hearing benefits and is the issue raised by claimant in this appeal. The Board has jurisdiction of that issue and this appeal.

Initially, claimant's focus and the focus of the medical treatment was on her left knee. However, the medical records and reports document that claimant complained of bilateral shoulder pain and right hip pain since at least June 2005 and right knee pain since September 2005. The right hip symptoms are related to claimant's low back according to Dr. Stuckmeyer. Claimant denies having any of these health conditions, symptoms or orthopedic complaints before her accident at work on February 20, 2004. But she did have bilateral carpal tunnel syndrome surgery in 1994, and there is a mention in Dr. Hendler's report of a prior neck and back injury in 2003.

Claimant attributes her right knee, low back and bilateral shoulder symptoms to the initial February 20, 2004, accident and subsequent overcompensation. Following her left knee surgery, claimant walked with the aid of crutches. This aggravated her shoulder problems. After the crutches were no longer needed, claimant walked with a limp favoring her injured left knee. This put additional strain on her right knee and low back.

⁷ P.H. Trans. (May 22, 2007) at 4.

The MRI of claimant's right shoulder taken in November 2007 showed a partial tear of the rotator cuff tendon. Although Dr. Jones was only authorized to treat claimant's left shoulder, he noted claimant had complaints of bilateral shoulder pain. When he released claimant on August 11, 2008, Dr. Jones recommended restrictions of no repetitive lifting above the shoulder for both the left and right upper extremities. He also restricted her to no lifting below the knee level, 20 pounds maximum waist to chest and 10 pounds maximum overhead.

Claimant has not worked since before her shoulder surgery in April 2008. She was terminated by respondent in August 2008.

Both Dr. Koprivica and Dr. Stuckmeyer describe claimant's right shoulder, right knee and low back (right hip pain) conditions as a direct and natural consequence of her work-related injury. Based on the record presented to date, this Board Member agrees.

CONCLUSION

(1) The Board has jurisdiction of the issue raised in this appeal.

(2) Claimant's current right knee, right shoulder and low back complaints are directly related to her injury of February 20, 2004, that arose out of and in the course of her employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Steven J. Howard dated May 4, 2009, is reversed and remanded to the ALJ for further orders concerning claimant's request for additional medical treatment and temporary total disability compensation.

IT IS SO ORDERED.

Dated this _____ day of July, 2009.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: John R. Stanley, Attorney for Claimant
Stephanie Warmund, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge